[redacted]

October Term, 1960

No. [redacted]

[redacted]

Petitioner

vs.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department

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BRIEF FOR THE PETITIONER

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

BRIEF FOR THE PETITIONER.

Opinions Below.

The action was tried in the Criminal Court of the City of New York, County of New York. No opinion was rendered by the three-judge court before whom the action was tried, except the statements at the conclusion of the trial finding petitioner guilty as charged (R. 23, 25-26), and suspending sentence (R. 24).

The judgment of conviction was affirmed by the Appellate Term of the Supreme Court of New York for the First Judicial Department (R. 27-28) without opinion.

An application for leave to appeal to the Court of Appeals of New York was denied (R. 28), without opinion.

Jurisdiction.

The judgment of the Appellate Term of the Supreme Court of New York for the First Judicial Department was entered on December 17, 1964 (R. 27-28). A timely application for leave to appeal to the Court of Appeals was denied on January 4, 1965 (R. 28). On March 25, 1965, by order of Mr. Justice Harlan, the time within which to file a petition for a writ of certiorari was extended to April 19, 1965 (R. 29). The petition was filed April 16, 1965, and was granted on April 25, 1966, limited to Question 4 presented by the petition (R. 30), as set forth hereinafter.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented.

Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and New York Penal Law, Section 1141, subdivision (1), are printed as Appendix A hereto.

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[1]Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart were of the opinion that certiorari should be granted on all the questions presented by the petition (R. 30).

Statement of the Case.

On April 11, 1964, a complaint was filed by a police officer, one Robert Griefenstein, averring that on the previous day the said officer had approached a newsstand at 263 West 42nd Street, located at the street level of a subway arcade in the County of New York, and spoken to an attendant at the stand and purchased two paperback books. These two books were entitled *Lust Pool* and *Shame Agent*. The police officer alleged that he paid the sum of $1.65 for the said two books and that the petitioner accepted the money. The officer also averred that the books he purchased were of a "lewd lascivious indecent nature", and that following the purchase the police officer announced his authority to the petitioner and seized six additional copies of *Lust Pool* (R. 2-3).

On April 29, 1964, a two-count Information (R. 6) was filed in the Criminal Court of the City of New York, County of New York, charging petitioner with violations of New York Penal Law, Section 1141, subdivision (1). Each count of the Information alleged that petitioner had sold an obscene book in violation of the statute. The cause came on for trial before a three-judge court in the Criminal Court of the City of New York, County of New York, on June 4, 1964 (R. 9).

The sole witness for the prosecution was police officer Griefenstein (R. 10). The officer testified that as he approached the newsstand he saw displayed in a book rack the two books herein involved. He pointed to the book rack in the presence of the clerk, petitioner herein, and said "Lust Pool and Shame Agent" (R. 10). The petitioner removed the two books from the book rack and placed them on the counter. The cost of

both books was $1.65. The police officer gave the petitioner two one dollar bills and the petitioner gave him $.35 change. Then petitioner placed the two books in a brown paper bag and handed it to the police officer [People's Exs. 1, 2, 3; R. 11].

After having made the purchase, Patrolman Griefenstein identified himself as a police officer. Petitioner asked him what was wrong and the officer told petitioner that he had a search warrant for the premises (R. 11-12). The officer asked petitioner whom he worked for (R. 12). Petitioner replied that he had been in the employ of a Mr. Block for some two years; that he alternated between the newsstand and the book store which was down the stairs in the subway itself. The petitioner earned $75.00 per week (R. 12). The officer asked petitioner: "Why do you sell this garbage?" Petitioner replied: "There is worse stuff than that around"; stating, "I think these books here are worse", referring, stated Officer Griefenstein, to "girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (R. 12).[2]

The aforesaid was the People's case (R. 13).

Petitioner moved to dismiss each count of the Information upon the grounds, among others, "that the People have failed to prove scienter, any knowledge of the contents of the book, either book, or that defendant

[2]On cross-examination, the officer admitted that he made no note of the conversation nor did he refer to it in the complaint (R. 2-3) which was filed, although it was his custom to make notes of conversations with persons whom he arrested (R. 12-13).

had any reason to believe that the books came within the prohibition of the law" (R. 13).

Petitioner testified that his principal duty was working in the book store in the arcade of the subway where paperbacks covering a wide variety of literary, scientific and popular subjects were sold (R. 14-15). Another man was ordinarily assigned to the newsstand, but the man had been ill and petitioner had filled in for him for an hour until the arrival of another employee (R. 15). Petitioner told the officer that he was up at the newsstand for only an hour because of the illness of the other employee for whom he was filling in (R. 16). Petitioner had never seen the two books here involved before the officer asked for them (R. 16). He had never been arrested nor convicted of any offense prior thereto (R. 16), nor did he recall any conversation as related by the police officer (R. 16).

After petitioner rested, petitioner renewed the motions made to dismiss and moved for judgment of acquittal on the ground that the People had failed to prove petitioner's guilt beyond a reasonable doubt (R. 22). The Court reserved decision. On June 11, 1964, the Court announced it had reached a decision: "The court has read the two books involved in this case and the motion to dismiss is denied as to each count of the information and the defendant is found guilty as charged of both counts of the information." (R. 23). On July 28, 1964, petitioner received a suspended sentence (R. 24).

On December 17, 1964, the Appellate Term of the Supreme Court of New York for the First Judicial Department affirmed the judgment of conviction, without opinion (R. 27-28). Application for leave to appeal to the Court of Appeals of the State of New York was denied, without opinion, on January 4, 1965 (R. 28).

Summary of Argument.

The statute herein has been so construed and applied as to authorize the conviction of the petitioner without proof that petitioner had knowledge of the contents or the alleged obscenity of the books involved.

In *Smith v. California,* 361 U.S. 147, the state ordinance imposing absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word was held invalid under the free speech and press provisions of the First and Fourteenth Amendments. It was held that scienter and mens rea are constitutionally required ingredients of the offense of obscenity; that the elimination of a scienter requirement substantially restricts freedoms of speech and press, and impels a self-censorship which ultimately deprives the community of access to constitutionally protected material. An obscenity statute which, on its face and as construed and applied, eliminates scienter, is unconstitutionally vague, both as a matter of procedural due process and substantive due process. The punishment of innocent and guiltless behavior, it was held in *Smith,* would run counter to the protections afforded by the Constitution.

In ordinary criminal cases, the burden is always on the prosecution to plead and prove every essential ingredient of the offense. Since obscenity prosecutions implicate questions of speech and press, due process clearly requires that the State bear the burden of persuasion to show that an accused knew that the material involved was obscene and, with such guilty knowledge, disseminated the material with the intent of appealing to prurient interest.

The case herein involves the question of the constitutional sufficiency of proof necessary to establish guilty knowledge and unlawful intent. This Court has constantly held that its review is not limited to the elaboration of constitutional principles; that in proper cases the Court must review the evidence to make certain that those principles have been constitutionally applied. The performance of this duty is especially required when the question is one of where the line should be drawn between constitutionally protected expression and alleged criminal speech.

The standards for assessing adequacy of proof needed to make out a case of criminal speech are necessarily strict if the guarantees of the provisions of the Bill of Rights are to be preserved. In the context of a penal statute which purports to punish the dissemination of obscene writings, the Constitution requires that the essential elements of obscenity, and the unlawful knowledge and purpose of the accused, be established beyond a reasonable doubt. If freedom of expression is to be

safeguarded, proof of guilty knowledge and unlawful intent in any obscenity prosecution must be clear, convincing, unequivocal and beyond doubt.

Measured by the requisite constitutional standards, the evidence in the record herein is clearly inadequate to sustain the judgment of conviction. The proof is insufficient to show either knowledge of the contents of the writings by the petitioner or any reason for the petitioner to believe that the material was obscene or otherwise unlawful. The evidence in the record is too insubstantial and lacking in any probative value to support the judgment of conviction. The State manifestly failed to meet the constitutional burden of proof. The broad protections of freedoms of speech and press would be seriously endangered if a judgment of conviction in an obscenity prosecution were to be sustained on the basis of the meager and flimsy evidence presented in the record herein.

ARGUMENT.

I.

The State Statute, as Construed and Applied to Authorize the Conviction of the Petitioner Herein Without Proof That the Petitioner Had Knowledge of the Contents or the Alleged Obscenity of the Books Involved, Deprives Petitioner of His Liberty Without Due Process of Law, and Abridges the Exercise of Freedoms of Speech and Press, Contrary to the Due Process and Free Speech and Press Provisions of the First and Fourteenth Amendments.

(a) The case herein involves important constitutional issues with respect to the quality of proof necessary to show scienter and mens rea in obscenity prosecutions. The fundamental question presented is whether the evidence in this record can constitutionally sustain the judgment of conviction rendered against petitioner under the principles enunciated by this Court and the demands of the Constitution.

The constitutional issues here involved should, it is submitted, be considered in the context of the basic constitutional postulates which should govern determination of issues of scienter and mens rea in an obscenity prosecution.[3]

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[3]The constitutional standards and criteria for judging issues of guilty knowledge and unlawful purpose in obscenity prosecutions were discussed in detail in Point I of the Brief for the Petitioner in the companion case of *Austin v. Kentucky*, October Term, 1966, No. 16, in which chief counsel for petitioner therein is the same as chief counsel for petitioner herein. Counsel does not therefore repeat, but incorporates by reference, the detailed analysis made in the *Austin* brief with respect to the general principles which should govern issues of scienter and mens rea in obscenity prosecutions. It may be helpful, however, to briefly summarize the conclusions which were reached in Point I of the *Austin* brief.

Every obscenity prosecution involving as it does books, writings and other media of communication, implicates questions of protection for freedoms of speech and press. Material which is not obscene is ordinarily entitled to the protection of the provisions of the First Amendment. It is important, it is submitted, to recall that freedoms of speech and press have been held by this Court to contain values which are essential in a democratic society; and it is, therefore, of the utmost significance that standards for judging obscenity and scienter be narrowly confined in order to safeguard freedom of expression.

It was not until the decision in *Roth v. United States,* 354 U.S. 476, that this Court undertook to define "obscenity" in the light of the demands of the First Amendment. Rejecting the *Hicklin* standard as unconstitutionally restrictive of freedoms of speech and press, this Court has held that the essential elements required to be established in any obscenity prosecution include: (1) the material must go substantially beyond customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.

In *Smith v. California,* 361 U.S. 147, the Court struck down a California ordinance which imposed strict or absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word. The reasons advanced by the

Court for holding that the elimination of scienter in obscenity prosecutions was constitutionally impermissible were as follows: that elimination of the scienter requirement would substantially restrict freedoms of speech and press; that such a procedural device would cause a self-censorship detrimental to the community and its access to constitutionally protected material; that a statute which eliminated scienter would be unconstitutionally vague, both as a matter of procedural due process and substantive due process; and that the punishment of innocent and guiltless behavior would clearly run counter to the protections afforded by the Constitution.

Since scienter and mens rea are therefore constitutionally required ingredients of the offense of obscenity, it would follow under the decisions of this Court that the burden is on the prosecution to plead and prove scienter and mens rea. It is of course settled that in criminal cases the burden is always on the prosecution to plead and prove every essential ingredient of the offense. Moreover, since obscenity prosecutions involve questions of speech and press, due process would certainly require that the State bear the burden of persuasion to show that an accused engaged in criminal speech.

The case herein should be considered, it is submitted, in the context of the aforesaid constitutional principles. These proceedings present a separate issue in the area of scienter and mens rea, to wit, the constitutional sufficiency of the proof necessary to establish guilty knowledge and unlawful intent. The questions presented are, first, what are the standards for assessing the adequacy of proof needed to make out a case of scienter and mens rea in obscenity prosecutions; and,

second, whether those standards have been met in the record presented in the case herein.

(b) Since a judgment involving freedoms of speech and press affects the exercise of freedoms deemed essential to the vitality of democratic institutions and a self-governing society, this Court has constantly held that the record upon which such a judgment is based will always be reviewed with the scrupulous care demanded by our Constitution.

Hence, in *Niemotko v. Maryland,* 340 U.S. 268, 271, the Court stated: "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." In *Napue v. Illinois,* 360 U.S. 264, 271, it was held: "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate."

In *Blackburn v. Alabama,* 361 U.S. 199, a case involving alleged violations of the Due Process Clause of the Fourteenth Amendment, this Court held: "It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves" (361 U.S. at 205, fn. 5). In *Edwards v. South Carolina,* 372 U.S. 229, a case involving rights of free speech, free assembly and freedom to petition for redress of grievances, this Court noted that it "remains our duty in a case such as this to make an independent examination of the whole record" (372 U.S. at 235).

In *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, this Court elaborated the constitutional principle with respect to review of judgments involving First Amendment rights.

> "Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' . . ." (376 U.S. at 284-285).

See also, *Jacobellis v. Ohio,* 378 U.S. 184, 189.[4]

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[4]"And this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. . . ." *Fiske v. Kansas,* 274 U.S. 380, 385. See also, *Thompson v. City of*

(This footnote is continued on the next page)

(c) The standards for assessing the adequacy of proof needed to make out a case of criminal speech are necessarily strict if the guarantees of the provisions of the Bill of Rights are to be preserved. In the context of a penal statute which purports to punish the dissemination of obscene writings and other media of communication, the Constitution would appear to require that the essential elements of obscenity as defined by this Court, and the unlawful knowledge and purpose of the accused, be established beyond a reasonable doubt.

If the State contends that it has a right to prevent the dissemination of a writing or other medium of communication, then, at the very least, the proof of specific unlawful knowledge and intent should be "solid". The evidence should be "substantial and beyond reasonable doubt", "clear, convincing and unequivocal", and "free from doubt". The factfinder should not be permitted to infer ultimate facts of scienter and mens rea from evidence based on suspicion, conjecture and surmisal, or on the basis of piling inference upon inference without any rational connection between the fact proved and the fact presumed. Proof of guilty knowledge and unlawful intent cannot be established by reliance on some isolated and equivocal utterance to establish the specific guilty knowledge and criminal intent which the law condemns.

On issues of scienter and mens rea, particularly where these issues are related to such complex questions as the extent of community toleration, appeal to prurient interest and the social importance of books and other

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Louisville, 362 U.S. 199; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Garner v. Louisiana*, 368 U.S. 157; *Taylor v. Louisiana*, 370 U.S. 154; *Shuttlesworth v. City of Birmingham*, 382 U.S. 87.

media of communication, the record requires scrupulous scrutiny. Since this Court has held that one of the principal dividing lines between constitutionality and unconstitutionality in the application of obscenity statutes is proof of scienter and mens rea, the freedoms to exercise speech and press will to a large degree depend upon the quality of the evidence deemed sufficient to support findings of guilty knowledge and unlawful intent. If freedom of expression is to be safeguarded, proof of guilty knowledge and unlawful intent in any obscenity prosecution must, it is submitted, be clear, convincing, unequivocal and beyond doubt.

The aforesaid principles are distilled from the decisions of this Court. In *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, there was admittedly proof of falsity in the statements made in the advertisement published in the newspaper, and there was proof of failure on the part of the employees of the newspaper to check the accuracy of the statement. Nevertheless, this Court held, "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open", that the record did not support a finding of actual malice (376 U.S. at 270). Applying the protective standards of the First and Fourteenth Amendments, the Court stated "that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law" (376 U.S. at 285-286).

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, one of the issues presented was whether the petitioners in the said case knew that some of the third-party ad-

vertisers were in the possession of alleged "hard-core" photographs, although the advertisements of such material in petitioners' magazines were admittedly not obscene. On the issue of scienter, Justice Harlan, announcing the judgment of the Court, held first, that the applicable federal statute must be construed as requiring proof that the publisher of the magazines knew that some of his advertisers were offering to sell obscene material. The scienter requirement was held to be constitutionally required under the decision in *Smith v. California,* 361 U.S. 147, and for reasons similar to those advanced in *Smith.* Secondly, turning to the record in the case, Justice Harlan rejected the "remote" and "general" testimony presented by the postal officials. It was held that an obscenity statute which requires proof of scienter "is not satisfied, as the Government suggests it might be, merely by showing that a defendant did not make a 'good faith effort' to ascertain the character of his advertiser's materials" (370 U.S. at 493). Justice Harlan added:

> "At best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same character, and with the same purposes, as those reflected in their own magazines. This is not enough to satisfy the Government's burden of proof on this score." (370 U.S. at 494-495).

In *Hartzel v. United States,* 322 U.S. 680, the accused was charged with violation of the Espionage Act by wilful attempt to cause insubordination in the Armed Forces and wilful obstruction of the recruiting and enlistment service of the United States. The proof

showed, among other things, that the defendant distributed secretly and anonymously to Army officers and registrants under the Draft Act articles against the war, our allies, Jews and the President of the United States. There was proof that defendant intended to create sentiment against the war among the White races and to unite them against the Yellow races (322 U.S. at 682-686). Nevertheless, this Court held that the requisite specific intent had not been proved beyond a reasonable doubt, and reversed the judgment of conviction. "Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime" (322 U.S. at 689). See also, *Keegan v. United States,* 325 U.S. 478, 480-495.

In *Herndon v. Lowry,* 301 U.S. 242, the defendant was charged with an attempt to induce others to join in combined resistance to the lawful authority of the State with intent to deny, to defeat, and to overthrow such authority by open force, violent means and unlawful acts. The evidence showed that the defendant was a paid organizer for the Communist Party, whose duties included creating an organization of the Party in Atlanta, Georgia. When arrested, defendant was found to have in his possession receipt books and membership books, considerable Party literature dealing with the revolutionary theories of Marxism and self-determination for the Negro people in the South (301 U.S. at 250). On the issue of the accused's "intent to incite insurrection" (301 U.S. at 253), the Court stated as follows:

> ". . . We are of opinion that the requisite proof is lacking. From what has been said above with re-

spect to the evidence offered at the trial, it is apparent that the documents found upon the appellant's person were certainly, as to some of the aims stated therein, innocent and consistent with peaceful action for a change in the laws or the Constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents.

"Thus, the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it. . . ." (301 U.S. at 259-260).

In *Baumgartner v. United States,* 322 U.S. 665, an action was brought by the Government to set aside a naturalization decree and cancel the certificate of naturalization. The District Court entered a decree for the Government and the Court of Appeals affirmed, both courts finding on the record sufficient support for findings of falsity and fraud in the procurement of the certificate. Despite the concurrent findings of the two lower courts, this Court held that the measure of proof requisite to denaturalize a citizen had not been met. It was held that the proof was not "clear, unequivocal and convincing", as required in cases which lie "close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship" (322 U.S. at 672). The Court held "that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that

citizenship was disloyally acquired. . . . The evidence in the record before us is not sufficiently compelling to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity" (322 U.S. at 676-677). See also, *Schneiderman v. United States,* 320 U.S. 118, 125; *Gonzales v. Landon,* 350 U.S. 920; *Noto v. United States,* 367 U.S. 290, 299; *Edwards v. South Carolina,* 372 U.S. 229; *Wood v. Georgia,* 370 U.S. 375. *Cf., United Mine Workers of America v. Gibbs,* 383 U.S. 715, 737.

It follows from the aforesaid decisions and other related rulings by this Court that where issues are presented "involving factual matters entangled in a constitutional claim" (*Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488) that this Court will always review the evidence in the record to determine whether or not the judgment involved is supported by the clear, convincing and unequivocal proof demanded by the Constitution. Unless proof of scienter and mens rea in an obscenity prosecution is convincingly clear and without doubt, a judgment based thereon must be annulled if the safeguards for the protections of freedoms of speech and press are to be maintained.

(d) Measured by the aforesaid requisite constitutional standards, the evidence in the record herein is clearly inadequate to sustain the judgment of conviction.

It is uncontradicted that the petitioner was merely a clerk who alternated between the newsstand where the arrest was made and the book store down the stairs in the subway itself (R. 12). As a matter of fact, petitioner had only been at the newsstand for about one hour on two earlier occasions besides the one on which

he was arrested. His principal duty was working downstairs in the book store (R. 14-15). Petitioner had never been arrested nor convicted of any offense before the arrest and conviction herein (R. 16).

The proof is insufficient to show either knowledge of the contents of the writings by the petitioner or any reason for the petitioner to believe that the material was obscene or otherwise unlawful. The price of the two books was nominal, one costing 90¢ and the other 65¢. Petitioner testified that he had never seen either of the two books involved herein before the time when the police officer made his purchase (R. 16).

Neither the inquiry of the police officer nor the alleged reply of petitioner (R. 12) were related to obscenity. The officer took it upon himself to voice a personal dislike for material which he believed from a view of the titles and covers were in poor taste and vulgar, to wit, "garbage". That the petitioner so allegedly construed the police officer's remark is evidenced by the purported comparison reference to "girlie" magazines, publications which had been held constitutionally protected by the highest court of the State in a number of decisions. *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760 (1964).

Thus, the alleged conversation offered by the prosecution proved only that the petitioner clerk was innocent of any guilty knowledge or unlawful intent. Moreover,

petitioner took the stand and testified that he did not recall having such conversation with the officer or making any reference to the magazines which were on the counter (R. 16). The general distrust of testimony purporting to foist upon an accused some extrajudicial oral statement has been noted by *Wigmore. Evidence* (3rd Ed. 1940) Vol. 4, §1056.

The entire record, it is submitted is too insubstantial and lacking in any probative value to support the judgment of conviction herein. The State manifestly failed to meet the high burden of proof imposed upon the State under the Constitution when First Amendment rights are involved.

The judgment of conviction herein, based upon inadequate evidence in support of the elements of scienter and mens rea, deprives petitioner of his liberty without due process of law because it deprives petitioner arbitrarily of a fair trial, undermines the presumption of innocence, relieves the prosecution of the obligation to produce evidence to sustain the burden of proving guilt beyond a reasonable doubt, and generally operates to punish innocent and guiltless behavior, all in violation of the procedural due process guarantees of the Fourteenth Amendment. Moreover, the judgment of conviction, resting on an inadequate record to prove scienter and mens rea, violates the spirit and letter of the decision of this Court in *Smith v. California*, 361 U.S. 147. The vagueness of the statute, as construed and applied by the state court to the petitioner herein, results in a pervasive censorial restriction on freedom of

expression, compelling the same self-censorship by booksellers which this Court noted in *Smith v. California*. The broad protections of freedoms of speech and press would, it is submitted, be seriously endangered if a judgment of conviction in an obscenity prosecution were to be sustained on the basis of the meager and flimsy evidence presented in the record herein in support of charges of guilty knowledge and unlawful intent.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of New York Penal Law, Section 1141, are:

> "§1141. Obscene Prints and Articles
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . drawing, photograph motion picture film, figure, image, . . .
>
> "Is guilty of a misdemeanor. . . ."
>
> (As amended L. 1950, c.623, §§1-3; L.1950, c. 624; L.1954, c.703; L.1955, c.837; L.1956, cc.423, 661, 662, 681; L.1957, c.690; L.1958, cc.735, 736, eff. July 1, 1958, L.1958, c.737, §§1, 2 eff. July 1, 1958 . . .)